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No. _____

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1989

HOSSEIN Z. NISTANK, aka JOHN NISTANK,
Petitioner,

-vs.-

SAROUSH KABOLI, aka STEVE KABOLI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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QUESTIONS PRESENTED

Did the Trial Court violate the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution when it did the following:

(a) Failed to grant Petitioner Nistank's Motion for Involuntary Dismissal when it was admitted by Court and Respondent Kaboli that a prima facie case was not proved all in violation of State procedural rule NRCP 41(b);

(b) Failed to exclude an undisclosed expert witness in violation of State procedural rule NRCP 26(b)(4) and established case law and then entered a judgment based solely upon that expert witness' testimony;

(c) Failed to carry out the provisions of the Uniform Partnership Act (NRS 87.400)

and established case law concerning accounting and distribution upon dissolution of a partnership.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Hossein Z. Nistank, also known as, John Nistank, the Respondent, Saroush Kaboli, also known as, Steve Kaboli and Faramarz Fayeghi.

It is the belief of the Petitioner that Faramarz Fayeghi has no interest in the outcome of this proceeding for the reason that the claims against Mr. Fayeghi were dismissed in the lower court action and Petitioner does not seek review of that dismissal.

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1 NRCP refers to Nevada Rules of Civil Procedure

2 NRS refers to Nevada Revised Statutes

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

The petitioner, Hossein Z. Nistank, also known as John Nistank (hereinafter referred to as "Nistank"), through counsel, respectfully prays that a writ of certiorari issue to review the Order Modifying Judgment and Dismissing Appeal and Cross-Appeal of the Supreme Court of the State of Nevada in the case of Saroush Kaboli, aka Steve Kaboli, Appellant/Cross-Respondent v. Hossein Z. Nistank, aka John

Nistank, Respondent/Cross Appellant v. Faramarz Fayeghi, Respondent, Case No. 17194, entered on the 30th day of March, 1989. (Order Denying Rehearing was entered on June 23, 1989.)

OPINIONS BELOW

The District Court of the Eighth Judicial District Court for Clark County, Nevada on August 14, 1985 entered a Decision in favor of Respondent Kaboli and against Petitioner, Nistank awarding Respondent Kaboli the sum of $222,000, together with statutory interest and costs. (Appendix Pages 11-13) On August 27, 1985 pursuant to the Decision referred to immediately above, Findings of Fact and Conclusions of Law were entered (Appendix Pages 14-20,) and on August 29, 1985 Judgment was entered in the Eighth Judicial District Court (Appendix Pages 21-23). On February 11, 1986 the Eighth Judicial District Court entered an Order (Appendix Pages 24-

25) which reaffirmed the Findings of Fact, Conclusions of Law and Judgment referred to above[1] .

On March 30, 1989, the Supreme Court of the State of Nevada in the case of Saroush Kaboli, aka Steve Kaboli, Appellant/Cross-Respondent v. Hossein Z. Nistank, aka John Nistank, Respondent/Cross Appellant v. Faramarz Fayeghi, Respondent, Case No. 17194, entered an Order Modifying Judgment and Dismissing Appeal and Cross-Appeal. Said Order is unpublished, and a copy is made part of the Appendix hereto (Appendix Pages 1-10.)

A timely motion for rehearing (Appendix Pages 28-44) was denied on June 23, 1989, without opinion by Order Denying Rehearing, which is part of the Appendix hereto (Appendix Pages 26-27.)

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1 The same had been previously vacated pursuant to stipulation of the parties in order to allow the submission of proposed findings, conclusions and judgments by both parties.

JURISDICTION

The Supreme Court of the State of Nevada entered an Order Modifying Judgment and Dismissing Appeal and Cross-Appeal from the Judgment of the District Court on March 30, 1989, and denied Motion for Rehearing on June 23, 1989. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1257(a).

NEVADA STATUTES INVOLVED

The applicable provision of the Uniform Partnership Act is **NRS 87.400** which provides in part as follows:

> "87.400. **Rules for distribution**. In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:
>
> 1. The assets of the partnership are:
>
> (a) The partnership property; and
>
> (b) The contribution of the partners necessary for the payment of all the liabilities specified in subsection 2.
>
> 2. The liabilities of the partnership shall rank in order of payment, as follows:

(a) Those owing to creditors other than partners.

(b) Those owing to partners other than for capital and profits.

(c) Those owing to partners in respect of capital.

(d) Those owing to partners in respect of profits.

NRS 87.080 provides as follows:

"**Property of Partnership.**

1. All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property.

2. Unless the contrary intention appears, property acquired with partnership funds is partnership property.

3. Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

4. A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears."

NRS 87.180 provides in pertinent part as follows:

"**Rules determining rights and duties of partners**. The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

1. Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits."

NRCP 26(b)(4) provides in pertinent part as follows:

(4) TRIAL PREPARATION: EXPERTS. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary

of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule and subdivision (h) of Rule 30, concerning fees and expenses."

NRCP 41(b) states as follows:

"*Involuntary dismissal: Effect thereof.* For failure of the plaintiff to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has failed to prove a sufficient case for the court or jury. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other that a dismissal for lack of jurisdiction, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

CONSTITUTIONAL PROVISIONS INVOLVED

Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

The underlying action involved the adjudication of the partnership interest of Petitioner Nistank and Respondent Kaboli in a business known as G. M. Credit, which was dissolved on or about January 16, 1980. On May 27, 1980, Respondent Kaboli filed an action against Petitioner Nistank for an accounting and to determine his partnership interest.

On May 6, 1985, on the eve of the expiration of Nevada's five year requirement to bring a matter to trial[2] , trial was commenced

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2 NRCP 41(e) states in pertinent part as follows:

> "Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced . . . . unless such action is brought to trial within five years after the plaintiff has filed his action. . . ."

in the Eighth Judicial District Court. During the presentation of Respondent Kaboli's case-in-chief, Petitioner's accountant was called to testify to the assets, liabilities and capital accounts of G. M. Credit as of the date of dissolution, January 16, 1980. That testimony established that the assets remaining in G. M. Credit as of the date of dissolution were equal to or less than the value of Petitioner Nistank's capital account therein and that therefore, Mr. Kaboli was entitled to no distribution.

Both Mr. Kaboli and the Trial Court acknowledged that Mr. Kaboli had not produced any evidence upon which an award of damages to Mr. Kaboli could be supported. Indeed, it was clear from the commencement of the trial that Respondent Kaboli was relying upon Petitioner Nistank's accountant.[3]

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3 **Mr. Wells:** "As I told the Court yesterday in my opening statement, the breakthrough as far as our case is concerned came when they (Nistank and Fayeghi) started fighting with each other and did these accountings, had their own accountant, Mr. Glennon,

After Respondent Kaboli concluded his case-in-chief, having presented no accounting or valuation evidence to support his claims, Petitioner Nistank filed a Motion for Involuntary Dismissal (Appendix Pages 45-62). That Motion was denied. The Nevada Supreme Court in its Order Modifying Judgment and Dismissing Appeal and Cross-Appeal did not dispute the fact that Mr. Kaboli had failed to present an accounting upon which damages other than "nominal damages" could be awarded.[4]

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do it. That's all their work. We are relying on that."

(Appendix Page 54)

4 "Nistank's last contention is that the court erred in refusing to dismiss the case at the close of Kaboli's case-in-chief because Kaboli failed to present an accounting. However, Kaboli presented substantial evidence of a breach of a partnership agreement and nominal damages, at least, were available. He also presented some evidence of the partnership assets. It was then incumbent upon Nistank, as the party asserting the existence of liabilities, to rebut Kaboli's evidence. See Schunk v. Thickman, 436 P.2d 542 (Wyo. 1968). Thus, this contention is

Petitioner Nistank in his case-in-chief, presented additional evidence in support of his accountant's testimony, including evidence that he had immigrated to the United States from Iran with approximately $250,000 and had invested approximately $130,000 to capitalize G. M. Credit's business.

At the commencement of Respondent Kaboli's case-in-rebuttal he called as an expert witness, one John Lowther to testify concerning the valuation of the G. M. Credit business at the time of its dissolution. Petitioner Nistank's counsel vehemently objected to the calling of Mr. Lowther. The pertinent portion of the argument on that objection is stated as follows:

Petitioner Nistank's counsel:

> "My objection, your Honor, is two-fold at this point to testimony from him. If you recall, we did submit

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also without merit."

(Appendix Pages 8-9)

pretrial interrogatories on January 24th of 1984 in which we specifically asked for the names of any witnesses and expert witnesses in regard to this case. That was a year and a half ago."

"The obligation to respond to these interrogatories is obviously, as we're all aware of it, a continuing nature, and this man is an expert who has material testimony which we could have elicited from him even at deposition during the hiatus in this case. I was told yesterday that I could not talk to him prior to trial."

"The second basis is that valuation of the business is the sort of testimony and evidence that should have been put on by the plaintiff in the plaintiff's case in chief, and I think that the rules are quite clear that it may not be made a part of the rebuttal case of the defendant where the obligation to present evidence was incumbent upon the plaintiff in presenting his case in chief.

* * *

"Obviously the question of valuing the business was one of the key questions in this case and has been for the five years, over five years, that this case has been in litigation.

(R. VIII, pp. 1603-1605)

Respondent Kaboli's counsel:

"I only retained Mr. Lowther

approximately a month ago after the trial had commenced, as I remember, and I did that on the basis that the way the evidence was going, it was clear to me that I was not going to be able to have sufficient evidence, after Mr. Glennon spoke or testified, to establish my client's damages since Mr. Glennon testified about making revisions and adjustments and so on on the balance sheet."

"It was my feeling at that time that I needed an expert, and I wanted to see what the defendants were going to put on in terms of their evaluation of the business."

(emphasis added - R. VIII 1605-1606)

Petitioner Nistank's counsel:

"I just want to note for the record, and I can't cite chapter and verse in the proceedings, but I represent that it's in here that we had a discussion of this during the testimony of Mr. Glennon. And I believe, and I think the record will bear it out, that I noted at that time that it was my view that the plaintiff had to present evidence on this issue in this case."

"And I believe that the court assumed that he would, and he did not. The only testimony on this issue was presented by Mr. Glennon as called by the plaintiff himself. . ."

"It seems to me, in fact, that Mr. Wells during his opening statement and during the course of the initial proceedings even on one or more occasions represented that he would present expert testimony and he did not, and I could find that."

(R. VIII 1607-1608)

The Court:

"It would occur to the Court that this is testimony that should have been rendered by the plaintiff in his case in chief."

(R. VIII 1609)

Nevertheless, the lower court allowed the undisclosed expert, Mr. Lowther to testify as a rebuttal witness, and then relying exclusively upon the testimony of Mr. Lowther found in favor of Respondent Kaboli in the amount of $222,000, together with statutory interest and costs.[5]

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5 "The valuation of the business was made difficult by the inadequate business records and less than cooperative discovery phase. However, **the Court was impressed with the expertise of Mr. John Lowther in valuation of small businesses and finds his assessment of the value of the business to be realistic."**

The Trial Court refused to adjust the value that it accepted from Mr. Lowther for the liabilities outstanding as of the date of dissolution, and the capital account of Mr. Nistank, all as required by Nevada's Uniform Partnership Act, NRS Chapter 87.010, et seq.

The Trial Court was apprised of each of the serious procedural errors in a timely fashion. The Nevada Supreme Court was further advised that the failure to correct these procedural errors would result in a denial of due process. The Nevada Supreme Court did not address the specifics of the constitutional issue.

REASONS FOR GRANTING WRIT

I. Procedural Due Process

The Fifth and Fourteenth Amendments to the United States Constitution require notice, an opportunity to be heard and a fair

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(emphasis supplied)

(Appendix 12-13, Decision filed 8-14-85)

trial. The underlying action was one to adjudicate claims of partners to partnership property, which is governed by the Nevada Uniform Partnership Act. NRS Chapter 87.010, et seq. The property of this partnership is specifically defined in NRS 87.080 and the rules determining the rights and partners are specifically defined in NRS 87.180, which provides in pertinent part as follows:

> "**Rules determining rights and duties of partners**. The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:
>
> 1. Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits."

The taking of a partner's property contrary to the express provisions of the

Uniform Partnership Act and in violation of procedural rules resulted in a failure to provide notice and an opportunity to be heard in violation of the due process clause of the Fifth and Fourteenth Amendments of Due Process. Armstrong v. Manzo, 380 U.S. 545 at 552, 85 S.Ct. 1187 at 1191 (1965) provides as follows:

> "A fundamental requirement of due process is 'the opportunity to be heard.' Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783. It is an opportunity which must be granted at a meaningful time and in a meaningful manner."

Similarly, the Nevada Supreme Court has recognized that the Fifth and Fourteenth Amendments to the United States Constitution require a Trial Court to afford a litigant procedural due process and a fair trial. Ivory Ranch v. Quinn River Ranch , 101 Nev. 471, 705 P.2d 673 (1985). The Nevada Supreme Court further determined in that case that as a minimum, the procedural rules must be followed and any deviation form the rules

which results in fundamental unfairness or prejudice is a denial of due process.

Indeed, the Nevada Supreme Court in Ivory, supra cited with approval Jiminez v. Tuna Vessel Granada 652 F.2d 415 (5th Cir., 1981), a case in which the Fifth Circuit reversed the Trial Court on the basis that procedural due process had been denied, observing:

> "Notice remains a first-reader element of procedural due process, and trial by ambush is no more favored here than elsewhere."
>
> 652 F.2d at 420

A. Procedural Due Process was Violated When Petitioner's Motion for Involuntary Dismissal Pursuant To NRCP 41(b) Was Not Granted At the Conclusion of Respondent Kaboli's Case-in-Chief

As the Statement of Case demonstrates, Respondent Kaboli had failed to present evidence in support of his claims during his case-in-chief. Petitioner Nistank filed a Motion for Involuntary Dismissal (Appendix

Pages 45-62) citing the governing Nevada case law, Rasmussen v. Thomas, 98 Nev. 216, 644 P.2d 1030 (Nev. 1982) which makes clear that Nevada's Uniform Partnership Act requires an accounting as a predicate to division of the partnership assets. Petitioner pointed out that Respondent Kaboli's counsel acknowledged at the outset of the trial that his evidence would be based upon the testimony of Petitioner Nistank's accountant. However, the evidence of Petitioner Nistank's accountant established that the value of the assets remaining in G. M. Credit after the same was dissolved represented Petitioner Nistank's capital contributions to the entity. He further indicated that there was no evidence to support a capital contribution by Respondent Kaboli, even though Mr. Kaboli, as managing partner had been responsible for maintaining all of the books and records for the G. M.

Credit business.[6] The evidence was clear that all profits had been drawn out of the business prior to dissolution.[7]

In short, there was no evidence to support an award of damages to Mr. Kaboli at the conclusion of his case and it was a denial of procedural due process to fail to grant Petitioner Nistank's Motion for Involuntary Dismissal.

B. Allowing Respondent Kaboli to Present the Testimony of an Undisclosed Expert Witness Violated Procedural Due Process

As noted above, Respondent Kaboli failed to carry his burden of proof during his case-in-chief. During presentation of his rebuttal case,

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6 "While plaintiff was the managing partner, both parties drew significant sums of money from the business during the partnership for personal use.

(Appendix p. 12, Decision filed 8-14-85

7 "Each of the parties were entitled to and did receive one-half of the net profits of the business until January of 1980. "

(Findings of Fact and Conclusions of Law filed 8-27-85, Appendix p. 18)

Respondent Kaboli called an undisclosed expert witness to fill the acknowledged and obvious void in his case.

Petitioner Nistank's counsel objected on two grounds:

1. That the rules of discovery required respondent to disclose expert witnesses in response to pretrial Interrogatories; and

2. That the expert could not properly be called as a rebuttal witness since his testimony was required to be presented during Respondent Kaboli's case-in-chief.

Nevada's discovery rule relative to expert witnesses NRCP 26(b)(4)(a) is identical to the Federal Rule. The rules of discovery regarding disclosure of the identity of expert witnesses is fundamental to procedural due process. As the Tenth Circuit Court of Appeals noted in Smith v. Ford Motor Co. (10th Cir, 1980), 626 F.2d 784, 794:

> "Professor Friedenthal has also recognized the critical nature of such

pretrial discovery:

> *It is fundamental that opportunity be had for full cross-examination, and this cannot be done properly in many cases without resort to pretrial discovery, particularly when expert witnesses are involved.* Unlike two eye-witnesses who disagree, two experts who disagree are not necessarily basing their testimony on their views of the same objective features. Instead they may rely on entirely separate data, since the theoretical bases underlying their respective approaches may differ radically. *Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he must have some idea of the bases of that opinion and the data relied upon. If the attorney is required to await examination at trial to get this information, he often will have too little time to recognize and expose vulnerable spots in the testimony.* He may need advice of his own experts to do so and indeed, in certain cases, his experts might require time to make further inspections and analyses of their own.

The need for pretrial discovery regarding expert witnesses is further evidenced by the ever-increasing dissatisfation with the honesty and reliability of

expert testimony. . . .

Friedenthal Discovery and Use of an Adverse Party's Expert Information. 14 Stan.L.Rev. 455, 485 (1962)[Footnote omitted]. [Emphasis supplied].

. . . .

[5] The failure of a party to comply with discovery requests under rule 26 has led to findings of prejudice resulting in the exclusion of the proffered evidence. Coleco Industries, Inc. v. Berman, 567 F.2d 569 (3d Cir. 1977), cert. denied, 439 U.S. 830, 99 S.Ct. 106, 58 L.Ed.2d 124 (1978); Tabachnick v. G. D. Searle & Co., 67 F.R.D. 49 (D.N.J. 1975). Similarly, although district courts enjoy wide discretion in handling discovery and pretrial matters. Phil Crowley Steel Corp. v. Macomber, Inc., 601 F.2d 342 (8th Cir. 1979), reversible error has been found in allowing testimony without such discovery where there has been a 'gross abuse of discretion resulting in fundamental unfairness in the trial of the case.' Voegeli v. Lewis, 568 F.2d 89, 96 (9th Cir. 1977); Shelak v. White Motor Co., 581 F.2d 1155 (5th Cir. 1978); Weiss v. Chrysler Motors Corp., 515 F.2d 449 (2d Cir. 1975)."

In Voegeli v. Lewis, (8th Cir., 1977), 568 F.2d 89, the reason for strict adherence to

discovery of expert opinions pretrial was explained:

> "Discovery of expert opinion must not be allowed to degenerate into a game of evasion. . . .Cf. Tabatchnick v. G. D. Searle, 67 F.R.D. 49 (D.N.J. 1975) (testimony of proposed new expert excluded because the need for such testimony and been clear three years earlier and defendants did not have an opportunity to prepare for trial and were unfairly prejudiced."

Additionally, Shelak v. White Motor Co., (5th Cir., 1978) 581 F.2d 1155, stated in part as follows:

> "Plaintiff's disregard for the federal rules of discovery in this area created a 'trial by ambush' which those rules are designed to prevent. The rules are designed to narrow and clarify the issues and to give the parties mutual knowledge of all relevant facts, thereby preventing surprise. Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). In view of the delay between the time the complaint was filed and the trial, the plaintiff's argument that he was unable earlier to find a doctor who could connect the heart attack with the accident is not persuasive. It must be assumed that plaintiff's counsel had applied himself diligently to his client's cause for almost two years and yet unable to

> find, until the jury selection day, any qualified physician on the medical opinion that the incident caused the plaintiff's heart attack."

Respondent Kaboli had five years to prepare for the trial of this action, admitted at the beginning of the trial that he knew he needed an expert opinion to present his case, admitted at the commencement of the trial that the only expert opinion which would be offered was that of the Petitioner's accountant (whose opinion did not support Respondent Kaboli's case) acknowledged at the conclusion of his case-in-chief that he had adduced no evidence upon which his client could recover and admitted that during the trial and after his case-in-chief had concluded, he first consulted an expert who he then called during his rebuttal case.

The testimony of this undisclosed expert was patently prejudicial since the Trial Court based his entire decision upon this Expert's

valuation of the partnership. (Appendix. pp. 11-13)

C. Failure to Carry Out the Provisions of the Uniform Partnership Act and Established Case Law Concerning Accounting and Distribution Upon Dissolution of a Partnership Denied Petitioner Nistank Due Process of Law.

The Uniform Partnership Act concerning accounting on dissolution is unambiguous. The Nevada Supreme Court, prior to this case had ruled concerning the need for an accounting. Rasmussen v. Thomas, 98 Nev. 216, 644 P.2d 1030 (Nev. 1982). The rules for distribution upon dissolution of assets among partners is mandatory under NRS 87.400. Under those rules, the Court was required to return capital contributions and pay all liabilities prior to any distribution. The trial Court ignored the requests of Petitioner Nistank to do so, and the Supreme Court of Nevada ignored its prior decisions concerning this basic right.

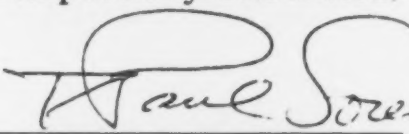
CONCLUSION

In the management of modern litigation, the role of the Court is clear. The Court must enforce its own rules and any deviations may not prejudice the litigant who relies upon the rules. The Trial Court ignored the mandatory language of Nevada's involuntary dismissal rule. The Trial Court further allowed an undisclosed expert witness to testify without an opportunity to depose him or to make inquiries into his qualifications and relationship with the parties and counsel, which would been done in the ordinary course. The Trial Court also ignored the mandates of the Uniform Partnership Act concerning accounting and distribution on dissolution. We believe the procedural dereliction resulted in a deprivation of due process of law as required by the Fifth and Fourteenth Amendments to the United States Constitution.

For these various reasons, this Petition

for Writ of Certiorari should be granted.

Respectfully submitted,



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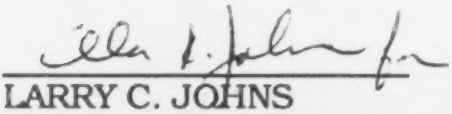

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